Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

GALEN HARDIN, JOHAN KLEHS, DEAN ANDAL, ERNEST J. DRONENBURG, JR., and JOHN CHIANG,

Petitioners,

v.

AGUA CALIENTE BAND OF CAHUILLA INDIANS and AGUA CALIENTE TRIBAL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Eleventh Amendment to the United States Constitution jurisdictionally bars suits by Indian tribes against States in federal court. *Ex parte Young*, 209 U.S. 123 (1908), allows as an exception to the Eleventh Amendment the equitable remedy of seeking prospective injunctive or declaratory relief against state officials. An equitable remedy is not available when there is an adequate remedy at law. Is a suit for tax refund in state court an adequate remedy at law so as to bar equitable relief in federal court against state officials concerning a state tax assessment?

2. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), held that the *Ex parte Young* exception to the Eleventh Amendment is not available in core areas of state sovereignty. In conflict with the Ninth Circuit's decision in the present case, a panel of the Tenth Circuit has held that state taxation is a core area of state sovereignty as described in *Coeur d'Alene*. Should this conflict in the circuits be resolved by this Court's determining that state taxation is a core area of state sovereignty that renders the *Ex parte Young* exception unavailable?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. Petitioner Galen Hardin, in his official capacity as Tax Compliance Specialist of the State Board of Equalization of the State of California;

2. Petitioner Johan Klehs, in his official capacity as Member of the State Board of Equalization of the State of California;

3. Petitioner Dean Andal, in his official capacity as Member of the State Board of Equalization of the State of California;

4. Petitioner Ernest J. Dronenburg, Jr., in his official capacity as Member of the State Board of Equalization of the State of California;

5. Petitioner John Chiang, in his official capacity as a Member of the State Board of Equalization of the State of California;

6. Respondent Agua Caliente Band of Cahuilla Indians, a federally recognized Indian tribe; and

7. Respondent Agua Caliente Tribal Corporation, a federally chartered tribal corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Galen Hardin, Johan Klehs, Dean Andal, Ernest J. Dronenburg, Jr., and John Chiang respectfully pray that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Ninth Circuit in the above entitled proceeding on September 11, 2000.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix, *infra*, pp. 1-16) is reported at 223 F.3d 1041.

JURISDICTION

The judgment sought to be reviewed was entered on September 11, 2000.

The order denying petition for rehearing and rejecting suggestion for rehearing en banc was filed October 26, 2000.

The statutory provision believed to confer on this Court jurisdiction to review the judgment on a writ of certiorari is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED
(set forth verbatium in Appendix, *infra*, pp. 46-48)

U.S. Const., Amend. XI

28 U.S.C. § 1341

28 U.S.C. § 1362

Cal. Rev. & Tax. Code § 6933

Cal. Rev. & Tax. Code § 6934

Cal. Rev. & Tax. Code § 6935

Cal. Rev. & Tax. Code § 6936

STATEMENT OF THE CASE

1. Importance

Tribal businesses with tribal sales to non-members are flourishing in the United States. Under California's generally-applicable statutes, California tribal sales to non-members give rise to the seller's obligation to collect a use tax from the buyer and remit the tax to the State Board of Equalization. In conflict with a Tenth Circuit decision, the Ninth Circuit has held that there is no sovereign immunity that will protect the State of California from federal-court consideration of injunctive or declaratory relief that will prevent California's tax collection. Certiorari is essential in this case to preserve the appropriate state court as the proper forum for considering issues concerning the legality of state taxes; these are core issues which pertain to the sovereignty and survival

of state governments. From the Ninth Circuit's decision, it is clear that there is a current need for this Supreme Court to reaffirm the rule, which is essential to the federal structure of this nation, that equitable relief is not available in the federal courts so long as California adequately provides for suits for refund of California taxes in California courts.

2. Asserted Jurisdiction in Court of First Instance

The Tribe asserted 28 U.S.C. § 1362 as the basis for federal jurisdiction in the court of first instance, the District Court. However, the Eleventh Amendment overrides 28 U.S.C. § 1362, and petitioners contend that there is no basis for federal jurisdiction in the court of first instance in the present case.

3. Parties

Respondent Agua Caliente Band of Cahuilla Indians, a federally recognized Indian tribe (hereinafter referred to collectively with Respondent Agua Caliente Tribal Corporation, a federally chartered tribal corporation, as "the Tribe"[1]), exercises its sovereign authority, subject to paramount federal law, over the lands of the Agua Caliente Indian Reservation ("the Reservation"). The Reservation is located in a checkerboard pattern (interspersed with land not on the Reservation) in the Cities of Palm

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[1] Neither the parties hereto nor the courts below have drawn any distinction between the above tribe and above corporation for purposes of the present case. The above tribe owns 100% of the stock of the above corporation.

Springs, Cathedral City, and Rancho Mirage, California, and in unincorporated areas of Riverside County, California. The members of the Tribe are citizens and residents of the State of California with the same rights as all other citizens and residents of the State of California, such as the right to vote and the right to attend public educational institutions.

Petitioner Galen Hardin is a Tax Compliance Specialist (tax collector) of the State Board of Equalization of the State of California ("the Board"). Petitioners Johan Klehs, Dean Andal, Ernest J. Dronenburg, Jr., and John Chiang are or were Members of the Board. The Board is an agency of the State of California.

4. Transactions with Non-Members of the Tribe

The Spa Hotel is located on the Reservation in the City of Palm Springs, California. During the period November 1, 1992, to June 30, 1997, the Tribe operated the Spa Hotel and sold food and beverages in the restaurants and bars thereof to non-members of the Tribe. These non-members of the Tribe ate this food and drank these beverages on the Reservation. The Tribe imported the above food and beverages onto the Reservation.

5. Tax Assessment

For the above period, the Board assessed the Tribe a use tax collection and remittance liability at the rate of 7.75% of the prices paid by the above non-members of the

Tribe to the Tribe for the above food and beverages.[2] The amount of this disputed use tax collection and remittance liability was $354,039.68, excluding interest and penalty. The Tribe did not pay this disputed liability to the Board. On behalf of the Board, Mr. Hardin informed the Tribe in writing that, if the Tribe did not pay the Board this disputed liability, plus interest and penalty, the Department of Alcoholic Beverage Control of the State of California ("the Department") would suspend the Tribe's alcoholic beverage license.

6. Proceedings Below

The Tribe commenced an action to challenge the disputed liability by filing in the United States District Court for the Central District of California a complaint for declaratory and injunctive relief against the Board, the Department, and Mr. Hardin, in his official capacity as a tax compliance specialist of the Board. The Tribe filed a first amended complaint for declaratory and injunctive relief against the Board, the Department, and Mr. Hardin, plus Messrs. Klehs, Andal, Dronenburg, and Chiang, in their official capacities as Members of the Board, and Jay

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[2] A state may validly impose a tax on the non-Indian purchasers of cigarettes purchased on Indian reservations and may validly require the Indian retailers of these cigarettes to collect this tax. *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 512-514 (1991); *Cal. Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11-12 (1985), *rehearing denied*, 474 U.S. 1077 (1986); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 150-161 (1980); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 481-483 (1976). Petitioners contend that this rule also applies to food and beverages.

Stron, in his official capacity as Director of the Department.

The Tribe dismissed the Department and Mr. Stron from the above action. The District Court on its own motion entered its order dismissing the Board from the above action, pursuant to the Eleventh Amendment to the United States Constitution.

The District Court tried the above action without a jury, decided that the action was jurisdictionally barred from the District Court by the Eleventh Amendment to the United States Constitution, and entered judgment that the Tribe take nothing by its first amended complaint on file in the action.

The Tribe appealed from this judgment to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals entered its judgment reversing the judgment of the District Court. Messrs. Hardin, Klehs, Andal, Dronenburg, and Chiang petitioned the Court of Appeals for rehearing and rehearing en banc. The Court of Appeals filed its order denying rehearing and rejecting rehearing en banc.

REASONS FOR GRANTING THE WRIT

I

THE *EX PARTE YOUNG* EXCEPTION TO THE ELEVENTH AMENDMENT PROVIDES AN EQUITABLE REMEDY; AN EQUITABLE REMEDY IS NOT AVAILABLE WHEN THERE IS AN ADEQUATE REMEDY AT LAW; AND THE TRIBE HAS THE ADEQUATE REMEDY AT LAW OF PAYING THE DISPUTED TAX AND SUING FOR A REFUND THEREOF IN STATE COURT

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[3]

The Eleventh Amendment bars suits in federal court against a State by its own citizens as well as by citizens of another State. *Edelman v. Jordan*, 415 U.S. 651, 662-663 (1974); *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 280 (1973); *Hans v. Lousiana*, 134 U.S. 1, 9-21 (1890). The Eleventh Amendment bars suits by Indian tribes against States in federal court. *Idaho v. Coeur d'Alene Tribe of Idaho* 521 U.S. 261, 268-269 (1997); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779-782 (1991). The Eleventh Amendment bars a suit against state officials when

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[3] "The phrase ['Eleventh Amendment immunity'] is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999).

the State is the real, substantial party in interest. *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 101 (1984).

Ex parte Young, 209 U.S. 123 (1908), held that the Eleventh Amendment does not prevent federal courts from granting prospective *injunctive* relief against state officials to prevent a continuing violation of federal law. *Green v. Mansour*, 474 U.S. 64, 68 (1985). An injunction is a remedy available only from equity. *Cory v. White*, 457 U.S. 85, 91 (1982). The substantive prerequisite for obtaining an equitable remedy, as well as the general availability of injunctive relief, depend on traditional principles of equity jurisdiction. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-319 (1999). Under established principles of equity, the exercise of equitable powers is inappropriate if there is an adequate remedy at law. *Moore v. Sims*, 442 U.S. 415, 425 (1979). In the federal courts, equity has always acted only when legal remedies were inadequate. *Beacon Theatres v. Westover*, 359 U.S. 500, 509 (1959). The necessary prerequisite to the right to maintain a suit for an equitable remedy is the absence of an adequate remedy at law. *Dairy Queen v. Wood*, 369 U.S. 469, 478 (1962). The availability of an adequate legal remedy renders a declaratory judgment unwarranted as well. *Nat. Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 591 (1995).

This Court has long and consistently held that a suit for tax refund in state court is an adequate remedy at law so as to make equitable relief in federal court unavailable. *Toomer v. Witsell*, 334 U.S. 385, 392, 406-407 (1948), *rehearing denied*, 335 U.S. 837 (1948); *Great Lakes Co. v. Huffman*, 319 U.S. 293, 296-302 (1943); *Stratton v. St.L.S.W. Ry.*, 284

U.S. 530, 532-534 (1932); *Matthews v. Rodgers*, 284 U.S. 521, 524-529 (1932); *Arkansas Building Association v. Madden*, 175 U.S. 269, 272-274 (1899).

A seller who wishes to obtain judicial review of the legality of a California use tax has the remedy of paying the tax and suing for a refund thereof in state court. Cal. Rev. & Tax. Code §§ 6933-6936. The parties have stipulated that the Tribe has this remedy. Appendix, *infra*, p. 38. The parties have also stipulated that the members of the Tribe are citizens and residents of the State of California with the same rights as all other citizens and residents of the State of California, such as the right to vote and the right to attend public educational institutions. Appendix, *infra*, p. 31. No hostility to or discrimination against the Tribe or its members has been asserted. Appendix, *infra*, pp. 28-43.[4]

The Tribe relies on the Indian jurisdiction statute (28 U.S.C. § 1362) in the present case to provide the Tribe with relief from which it would otherwise be barred by the Tax Injunction Act (28 U.S.C. § 1341). Appendix, *infra*, pp. 8-9 fn. 5, 16 fn. 8 and accompanying text. The Indian jurisdiction statute overrides the Tax Injunction Act. *Moe v. Salish & Kootenai Tribes, supra*, 425 U.S. 463, 470-475. However, the Eleventh Amendment overrides the Indian jurisdiction statue. *Blatchford v. Native Village of Noatak, supra*, 501 U.S. 775, 779-788. This Supreme Court has held

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[4] See, *Alden v. Maine, supra*, 527 U.S. at 755: "The good faith of the States thus provides an important assurance that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.' "

that, where the Tax Injunction Act does not apply, the case law rule of *Matthews v. Rodgers, supra*, 284 U.S. 521, 524-529, controls. *Great Lakes Co. v. Huffman, supra*, 319 U.S. 293, 296-302. Under *Matthews*, a suit for tax refund in state court is an adequate remedy at law so as to make equitable relief in federal court unavailable. 284 U.S. at 524-529. The present case fits precisely within the rule articulated by *Matthews* and *Great Lakes*.

Nevertheless, the opinion below failed to mention *Matthews* and *Great Lakes* on the issue of whether a suit for tax refund in state court is an adequate remedy at law so as to make equitable relief in federal court unavailable. Appendix, pp. 16-18. Messrs. Hardin, Klehs, Andal, Dronenburg, and Chiang in their Appellees' Brief and in their Petition for Rehearing and Rehearing En Banc cited *Matthews* and *Great Lakes* to the Court of Appeals on this issue. The rule for *non*-tax cases is that the measure of adequacy of a plaintiff's legal remedy is the legal remedy afforded by the federal, not the state, courts. The opinion below made the mistake of applying this rule for *non*-tax cases to the present *tax* case.

Great Lakes Co. v. Huffman, supra, acknowledged "the settled rule [for *non*-tax cases] that the measure of inadequacy of the plaintiff's legal remedy is the legal remedy afforded by the federal not the state courts." 319 U.S. at 297. Nevertheless, *Great Lakes Co.* followed the equally settled rule for *tax* cases that a suit for tax refund in state court is an adequate remedy at law so as to make equitable relief in federal court unavailable. 319 U.S. at 296-302.

The opinion below described the Tribe's suit as one against various state officials for a declaratory judgment *that federal law precludes imposition of California's sales* and use tax on purchases of food and beverages by non-tribal members at a tribal resort on reservation land.[5] Appendix, *infra*, pp. 1, 4-5, 8. *Great Lakes Co. v. Huffman*, *supra*, specifically held that a suit for tax refund in state court is an adequate remedy at law so as to make *declaratory* relief in federal court unavailable. 319 U.S. at 296-302. The opinion below could not distinguish *Great Lakes v. Huffman* and *Matthews v. Rodgers*. So it ignored them.

The *Ex parte Young* exception to the Eleventh Amendment provides an equitable remedy; an equitable remedy is not available when there is an adequate remedy at law; and the Tribe had the adequate remedy at law of paying the disputed tax and suing for a refund thereof in state court. Therefore, the Tribe's present suit is barred from federal court by the Eleventh Amendment to the United States Constitution.

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[5] The Tribe's claim for injunctive relief was against parties who have been dismissed from the present case. Appendix, *infra*, p. 5 fn. 2.

II

IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN THE PRESENT CASE, THE TENTH CIRCUIT HAS HELD THAT STATE TAXATION IS A CORE AREA OF STATE SOVEREIGNTY THAT IS NOT SUSCEPTIBLE TO THE *EX PARTE YOUNG* EXCEPTION TO THE ELEVENTH AMENDMENT

In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), this Court held that the *Ex parte Young* exception to the Eleventh Amendment is not available in core areas of state sovereignty. *Id.* at 281-288. Thereafter, in *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998), *cert. denied*, 525 U.S. 1122 (1999), the United States Court of Appeals for the Tenth Circuit held that state taxation is a core area of state sovereignty such that the *Ex parte Young* exception is not available therein. *Id.*, 150 F.3d at 1193-1194. The opinion below held to the contrary of *ANR Pipeline* on this point. Appendix, *infra*, pp. 6-16.[6]

It is difficult to imagine more of a core area of state sovereignty than that of state taxation. As observed by the Court of Appeals in *ANR Pipeline*:

> "Indeed, where it is possible to imagine a state government continuing to maintain its sovereignty despite the lack of any ownership of

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[6] In *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566 (10th Cir. 2000), *cert. pending* in No. 00-556, a different panel of the United States Court of Appeals for the Tenth Circuit inexplicably disregarded *Coeur d'Alene* altogether. *Id.*, 213 F.3d at 570-573. One of the contentions in the petition for writ of certiorari in *Sac & Fox* is that state taxation is a core area of state sovereignty that renders unavailable the *Ex parte Young* exception to the Eleventh Amendment.

> land, cf. Coeur d'Alene Tribe, 117 S.Ct. at 2041, it is impossible to imagine that a state government could continue to exist without the power to tax." 150 F.3d at 1193.

In *Nat. Private Truck Council, Inc. v. Oklahoma Tax Comm'n, supra,* 515 U.S. 582, this Honorable Court stated:

> " 'It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.' " *Id.* at 586 (quoting *Dows v. City of Chicago,* 78 U.S. 108, 110 (1871)).

State taxation is clearly a core area of state sovereignty. The *Ex parte Young* exception is not available in this core sovereign area.

Unless *Coeur d'Alene*'s protection of state sovereign immunity is meaningless, the opinion below is incorrect. It is in direct conflict with *ANR Pipeline*'s correct holding that the *Ex parte Young* exception to the Eleventh Amendment is not available in the core sovereign area of state taxation. Therefore, the Tribe's present suit is barred from federal court by the Eleventh Amendment to the United States Constitution.

CONCLUSION

The decision of the Court of Appeals in the present case (1) ignores the rule of *Great Lakes Co. v. Huffman, supra,* 319 U.S. 293, 296-302, and *Matthews v. Rodgers, supra,* 284 U.S. 521, 524-529, that a suit for tax refund in

state court is an adequate remedy at law so as to make equitable relief in federal court unavailable and (2) conflicts with the Tenth Circuit's holding in *ANR Pipeline Co. v. Lafaver, supra,* 150 F.3d 1178, 1193-1194, that state taxation is a core area of state sovereignty that renders unavailable the *Ex parte Young* exception to the Eleventh Amendment. For the foregoing reasons, a writ of certiorari should issue to review the opinion and judgment of the Court of Appeals in the present case and, upon review, to reverse them.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AGUA CALIENTE BAND OF CAHUILLA INDIANS, a federally-recognized Indian Tribe; AGUA CALIENTE TRIBAL CORPORATION, a federally-chartered Tribal governmental corporation,

Plaintiffs-Appellants,

v.

GALEN HARDIN, in his official capacity as Tax Compliance Specialist of California State Board of Equalization; JOHAN KLEHS, in his official capacity as member of the California State Board of Equalization; DEAN ANDAL, in his official capacity as member of the California State Board of Equalization; ERNEST J. DRONENBURG, JR., in his official capacity as member of the California State Board of Equalization; JOHN CHIANG, in his official capacity as member of the California State Board of Equalization,

Defendants-Appellees.

No. 99-55251

D.C. No. 98-CV-05521-R

OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
June 7, 2000 – Pasadena, California

Filed September 11, 2000

Before: Stephen S. Trott, Ferdinand F. Fernandez, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown

COUNSEL

Art Bunce, Law Offices of Art Bunce, Escondido, California, for the appellants.

Herbert Levin, Office of the Attorney General of the State of California, Los Angeles, California, for the appellees.

OPINION

McKEOWN, Circuit Judge:

The Agua Caliente Band of Cahuilla Indians and the Agua Caliente Tribal Corporation (collectively "the Tribe") seek a declaratory judgment that federal law precludes imposition of the State of California's sales and use tax on purchases of food and beverages by non-tribal members at a tribal resort on reservation land. The district court determined that the Eleventh Amendment barred the Tribe's claims and dismissed the action for lack of jurisdiction. Citing the Supreme Court's recent treatment of the *Ex Parte Young* doctrine in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the court reasoned that state taxation involved a "core area of state

sovereignty," and found that the *Young* exception to sovereign immunity did not apply. The court also found that the *Young* exception was inapplicable because the Tribe had an adequate remedy at law: it could pay the disputed tax and then sue in state court for a refund. We conclude that the Tribe's claims fall within the *Ex Parte Young* exception to the Eleventh Amendment bar, that *Coeur d'Alene* does not alter the scope of the *Young* exception in this case, and that the district court therefore erred in concluding that it lacked jurisdiction. Accordingly, we reverse and remand.

BACKGROUND

The Agua Caliente Band of Cahuilla Indians is a federally recognized Indian tribe. In 1959, the Tribe[1] leased certain reservation property to a non-tribal party, which then constructed a hotel on the property. Many years later, in 1992, the Tribe purchased a leasehold interest in the hotel. Pending the issuance of a federal charter for a tribal corporation pursuant to the Indian Reorganization Act of June 18, 1934, 25 U.S.C. § 477, the Tribe transferred that interest to a tribal-owned holding company. In 1994 a charter was granted, the Agua Caliente Tribal Corporation was formed, and the Tribe assumed ownership of 100% of the Corporation's stock. The Tribe

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[1] To explain the relationship between the Agua Caliente Band of Cahuilla Indians and the Agua Caliente Tribal Corporation, in this paragraph "Tribe" refers only to the Agua Caliente Band of Cahuilla Indians, not to the Corporation. Elsewhere in the opinion, for ease of reference, we refer to both collectively as "the Tribe."

then transferred the leasehold interest in the hotel from the holding company to the Corporation, which has operated the hotel since that time.

The hotel is located on land near Palm Springs, California, that has been part of a reservation since 1876, and that is currently held in trust by the United States for the benefit of the Tribe. Known variously as the Spa Hotel Resort, the Spa Hotel Resort & Mineral Springs, and the Spa Hotel and Casino, the hotel features 230 rooms, a natural mineral springs spa, several restaurants and bars, a casino, and various other guest amenities. Patrons of the hotel – primarily non-tribal members – purchase food and beverages for consumption on the hotel property. During the time period relevant to this appeal, the Tribe did not collect California's sales or use tax from non-tribal consumers of food and beverages.

In 1998, the California State Board of Equalization assessed the Tribe a use tax collection and remittance liability totaling approximately $354,040, excluding interest and penalties, for the period from 1992 to 1997. This sum corresponded to the amount of unpaid use tax attributable to the Tribe's sale of food and beverages to non-tribal members. The Board informed the Tribe that if it failed to pay the tax within one month, the Department of Alcoholic Beverage Control would suspend its alcoholic beverage license.

Although the Tribe did not dispute the amount of the assessed tax, it did dispute its obligation to pay the tax and immediately filed the underlying action seeking

declaratory and injunctive[2] relief against the California Board of Equalization, the Department of Alcoholic Beverage Control, and the Director of the Department of Alcoholic Beverage Control. The Tribe claimed that food and beverages sold to non-members are items of "reservation-based value" because the Tribe adds value in preparation, service, facilities, management and the like. In opposition to the Tribe's request for a temporary restraining order and preliminary injunction, the defendants raised an Eleventh Amendment immunity defense. Following the district court's grant of a preliminary injunction, the Tribe amended its complaint to add as defendants the individual members of the Board of Equalization and to allege a theory of relief under the *Ex parte Young* doctrine. The Department of Alcoholic Beverage Control and its Director agreed not to suspend the Tribe's liquor license pending the outcome of the litigation and were thereafter dismissed from the case,[3] leaving as defendants several individual members of the Board, sued in their official capacities ("the Board").

At the conclusion of a one-day bench trial on the merits of the Tribe's claims, the district court concluded

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[2] The Tribe's claim for injunctive relief sought an injunction prohibiting the Department of Alcoholic Beverage Control and its director from suspending the Tribe's liquor license for its failure to pay the assessed taxes. Because they are no longer parties to this case, as explained below, the only claim at issue now is the Tribe's claim for declaratory relief.

[3] The California State Board of Equalization was also dismissed.

that it lacked jurisdiction because of the Eleventh Amendment and did not reach the merits of the Tribe's allegations. In its findings of fact and conclusions of law, the court reasoned that the *Young* exception to Eleventh Amendment sovereign immunity does not apply to claims implicating core areas of state sovereignty, including state taxation. Thus, the court held that the Eleventh Amendment barred the Tribe's claims and divested the court of jurisdiction. As an alternative basis for holding that it lacked jurisdiction, the court reasoned that the *Young* exception does not apply if there is an adequate remedy at law, and the Tribe had such a remedy because it could pay the tax and then sue for a refund in state court on the basis of its federal claims. The Tribe timely appealed, and we have jurisdiction under 28 U.S.C. § 1291.

ANALYSIS

I. Eleventh Amendment

The Eleventh Amendment grants to states a sovereign immunity from suit[4] that, when invoked, bars adjudication of a dispute in federal court. Although the

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[4] The Supreme Court has construed the amendment to bar not only suits by citizens of another state or citizens of a foreign state, but also suits by a state's own citizens, *Hans v. Louisiana*, 134 U.S. 1 (1890), by another sovereign, *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), or by an Indian Tribe, *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). However, suits by the United States against a State are not subject to the Eleventh Amendment bar, *United States v. Texas*, 143 U.S. 621 (1892), nor are suits by one State against another State, *South Dakota v. North Carolina*, 192 U.S. 286 (1904).

Amendment itself suggests that the bar is jurisdictional in nature, the Supreme Court recently noted that such an interpretation "has been neither our tradition nor the accepted construction of the Amendment's text." *Coeur d'Alene*, 521 U.S. at 267. Instead, the Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction." *Id.* Though not jurisdictional in the traditional sense, whether the Tribe's claims are barred by the Eleventh Amendment presents threshold issues for our review.

Since the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), courts have recognized an exception to the Eleventh Amendment bar for suits for prospective declaratory and injunctive relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law. The *Young* doctrine is premised on the fiction that such a suit is not an action against a "State" and is therefore not subject to the sovereign immunity bar. The *Young* doctrine strikes a delicate balance by ensuring on the one hand that states enjoy the sovereign immunity preserved for them by the Eleventh Amendment while, on the other hand, "giving recognition to the need to prevent violations of federal law." *Coeur d'Alene*, 521 U.S. at 269. And, while the Supreme Court has recently revisited the scope of both the Eleventh Amendment and the *Young* exception in *Coeur d'Alene* and in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court has made clear that it does not "question the continuing validity of the *Ex parte Young* doctrine." *Coeur d'Alene*, 521 U.S. at 269; *see also Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir.

1997) ("The viability of *Ex parte Young* as traditionally applied survives the Supreme Court's treatment of the issue in *Idaho v. Coeur d'Alene* [.]"). Our task here is to determine whether the Tribe's claims fall within the scope of the doctrine.

The Tribe has sued various state officials in their official capacities for declaratory relief, specifically seeking a declaratory judgment that application of California's sales and use tax to food and beverage purchases made by non-Indians at the Spa Hotel violates federal law which prohibits state taxation of value-generating activities on reservation land. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976). Based upon traditional *Young* jurisprudence, the Tribe's claims appear to fall squarely within the exception. The Board argues, however, that *Coeur d'Alene* narrowed the *Young* doctrine to preclude its application to claims implicating core areas of state sovereignty and that because the Tribe's requested relief, if granted, would directly threaten California's sovereign authority to tax, the Tribe's claims are barred by the Eleventh Amendment.[5] But for the

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[5] The Tax Injunction Act, which generally bars federal courts from providing declaratory or injunctive relief to parties challenging state tax provisions where a "plain, speedy and efficient remedy may be had in the courts of such State[,]" does not bar this action. 28 U.S.C. § 1341. In *Moe*, 425 U.S. at 472-74, the Supreme Court held that § 1341's jurisdictional bar does not apply to Indian tribes bringing suit under 28 U.S.C. § 1362, which provides that district courts "shall have original

Supreme Court's decision in *Coeur d'Alene*, resolution of the *Young* issue would be straightforward: as traditionally understood, "*Young* . . . held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). We therefore consider whether *Coeur d'Alene* narrowed the *Young* exception in the way, and to the extent, urged by the Board.

At issue in *Coeur d'Alene* was the tribe's claims to submerged lands located within the boundaries of the Coeur d'Alene Reservation. As here, the tribe named as defendants the State of Idaho, various state agencies, and various state officials in their official capacity. The tribe sought, in addition to its land title claims, declaratory and injunctive relief establishing its exclusive right to the use and enjoyment of the submerged lands and prohibiting the defendants from regulating the lands. The defendants claimed immunity from suit under the Eleventh Amendment. A majority of the Court concluded that the *Young* exception did not apply because of the unique nature of the tribe's claims, which the Court determined were the "functional equivalent" of a quiet title action

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jurisdiction of all civil actions, brought by any Indian tribe or band . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Section 1362 does not, however, waive state sovereign immunity. *See Blatchford*, 501 U.S. at 786 (holding that § 1362 does not reflect Congress's "unmistakably clear" intent to abrogate immunity). *Cf. Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 571 (10th Cir. 2000) (acknowledging the Court's holding that § 1362 does not operate as a general waiver of state sovereign immunity).

that would have divested the state of substantially all regulatory power over the land at issue. *Coeur d'Alene*, 521 U.S. at 282; *see also id.* at 289, 296 (O'Connor, J., concurring in part). The challenge posed by *Coeur d'Alene* is to figure out whether the Tribe's claims here are of the same character as those in *Coeur d'Alene*.

The *Coeur d'Alene* decision reflects divergent views among the Justices as to the nature and scope of the *Young* doctrine. In the principal opinion, Justice Kennedy, joined only by Justice Rehnquist, emphasized that a "careful balancing" is required "when determining whether the *Young* exception applies in a given case," *id.* at 278, and that a "case-by-case approach to the *Young* doctrine has been evident from the start." *Id.* at 280. Focusing on the "special sovereignty interests" at issue in the case, Justice Kennedy noted the relevance of such factors as the particular federal right a lawsuit implicates, and whether " 'special factors counse[l] hesitation' " in the exercise of jurisdiction. *Id.* at 280, 282 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971)); *see also id.* at 274-75, 278-80. Rejecting the balancing inquiry and disagreeing with this characterization of *Young*, Justice O'Connor, joined by Justices Scalia and Thomas, stated in a partial concurrence that "[t]his approach unnecessarily recharacterizes and narrows much of our *Young* jurisprudence." *Id.* at 291. In Justice O'Connor's view, "the principal opinion replaces a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks [prospective] relief . . . with a vague balancing test that purports to account for a 'broad' range of unspecified factors." *Id.* at 296. Justice O'Connor concluded that under the Court's

precedents, "a *Young* suit is available where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective." *Id.* at 294 (emphasis omitted). The dissenting Justices, while disagreeing with the result, noted that Justice O'Connor's partial concurrence "reject[ed] the lead opinion's call for- . . . case-by-case balancing," and commented that "there is reason for great satisfaction that Justice O'Connor's view is the controlling one . . . " *Id.* at 297-98 (Souter, J., dissenting).[6]

Although the five members of the majority may have disagreed on the specifics of the *Young* analysis, they agreed that the Eleventh Amendment barred the tribe's suit. Central to the Court's decision was the degree to which the tribe's requested relief would have invaded Idaho's unique interest in the submerged lands, *see id.* at 282-84; *see also id.* at 291, 296 (O'Connor, J., concurring in part), which led the Court to "examine the effect of the Tribe's suit and its impact on [the state's] special sovereignty interests." *Id.* at 281. To that end, the Court stated that "[t]he suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory,"

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[6] *Cf. Earles v. State Bd. of Certified Pub. Accountants of Louisiana*, 139 F.3d 1033, 1039 (5th Cir. 1998) ("We concur with the consensus among other courts that although the principal opinion in *Coeur d'Alene* suggests a case-by-case (rather than rule-based) approach to the application of *Ex parte Young*, this part of the opinion did not muster a majority. . . . ") (citation omitted). *Accord Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 913-14 (8th Cir. 1997).

id. at 282, stripping the state of a broad range of powers associated with its control of that land:

> [T]he declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that *substantially all benefits of ownership and control would shift from the State to the Tribe.* This is especially troubling when coupled with the far-reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action. The suit seeks, in effect, a determination that the lands in question are *not even within the regulatory jurisdiction of the State.* The requested injunctive relief would *bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters.*

Id. (emphasis added). The unique nature of the tribe's claims and the relief it requested led the Court ultimately to conclude that the tribe's suit was in essence a suit against the State itself: "[t]o pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands." *Id.* Justice O'Connor emphasized this reasoning in her partial concurrence: "Where a plaintiff seeks to divest the State of all regulatory power over submerged lands . . . it simply cannot be said that the suit is not a suit against the State." *Id.* at 296. Finally, writing for the majority, Justice Kennedy further noted that the requested relief would affect the State's sovereign interests "in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury," *id.* at 287, relief that has never been available under the *Young* doctrine. The Court therefore

held that the Eleventh Amendment barred the tribe's claims.

It is against this backdrop that we are asked by the Board to hold that California's sovereign interest in taxation is akin to Idaho's sovereign interest in its submerged lands, likewise rendering the *Young* fiction inapplicable here. Because we do not read *Coeur d'Alene* this broadly, we decline to do so.

We start with the principle that the *Young* doctrine is alive and well and that *Coeur d'Alene* addressed a unique, narrow exception not present here. We do not read *Coeur d'Alene* to bar all claims that affect state powers, or even important state sovereignty interests.[7] If, as in *Coeur d'Alene*, the requested relief would infringe upon a state's sovereignty to such a degree as to render the suit against the state itself, then it is barred by the Eleventh Amendment. *Id.* at 296 ("it simply cannot be said that the suit is not a suit against the state"). This is in line with our traditional conception of the *Young* exception, which has always distinguished between a suit against a State *qua* State and a suit against a state official to enjoin the enforcement of a state act that violates federal law: the *Young* doctrine has always permitted the latter to avoid the sovereign immunity bar.

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[7] *But see ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1190, 1193-94 (10th Cir.1998) (applying *Coeur d'Alene* and holding that the Eleventh Amendment barred a corporation's challenge to state personal property taxes because "a state's interests in the integrity of its property tax system lie at the core of the state's sovereignty" and that the relief requested would be " 'fully as intrusive' into the state's sovereignty as would be a retroactive money judgment.").

In *Coeur d'Alene*, it was the unique divestiture of the state's broad range of controls over its own lands that made the *Young* exception to sovereign immunity inapplicable. Thus, in the case on appeal here, characterizing the state's interest in taxation as a core sovereignty area does not address the question posed by *Coeur d'Alene*. Indeed, the question posed by *Coeur d'Alene* is not whether a suit implicates a core area of sovereignty, but rather whether the relief requested would be so much of a *divestiture* of the state's sovereignty as to render the suit as one *against the state itself*. To interpret *Coeur d'Alene* differently would be to open a Pandora's Box as to the relative importance of various state powers or areas of state regulatory authority. The majority did not countenance such a result.

Applying this understanding of *Coeur d'Alene* to our case, it is clear that state taxation of tribes presents a very different circumstance from the situation in *Coeur d'Alene*. While we recognize that the power to impose a sales and use tax involves an important aspect of state sovereignty, we cannot overlook the fact that the claims here are brought by an Indian tribe. Indeed, in the context of state taxation of *tribes*, there are preemption considerations and *competing* sovereignty interests, the merits of which are governed by a long line of cases. *See, e.g., Cabazon Band*, 480 U.S. 202; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Confederated Tribes*, 447 U.S. 134; and *Moe*, 425 U.S. 463. As we stated in *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987):

> In *Cabazon*, the Supreme Court stated that "the federal tradition of Indian immunity from state taxation is very strong and . . . the state interest

> in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case."

Id. at 901 (citation omitted). The determination of whether the Young exception applies does not call for a balancing of one sovereign interest vis-a-vis another sovereign interest. Nonetheless, to assess the significance of the potential interference with California's sovereignty in this case, it is important to distinguish between the sovereign divestiture claim in *Coeur d'Alene* and the dispute here among sovereigns as to the reach of the taxing authority. Accordingly, although we express no view on the merits, we conclude that the Tribe's requested relief would not affect California's sovereignty interests to such "a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury," *Coeur d'Alene*, 521 U.S. at 287, but would only ensure that the state sales and use tax be applied by state officials in a manner consistent with federal law. Any effect the Tribe's requested relief would have on the state's tax collection activities does not rise to the level of the interference with state sovereignty that existed in *Coeur d'Alene*.

We also note that the decision in *Coeur d'Alene* rested in large part on the characterization of the claim as the "functional equivalent" of a quiet title action, a suit that could not be brought in federal court. *See id.* at 282; *see also id.* at 289 (O'Connor, J., concurring in part). In contrast, there is a long tradition of federal courts exercising jurisdiction over tribal challenges to state taxation. For example, in *Moe*, the Court upheld a tribe's right to maintain suit on its own behalf to enjoin collection of state cigarette sales tax. *Moe*, 425 U.S. 463. *See also Gila*

River Indian Community v. Waddell, 91 F.3d 1232 (9th Cir. 1996); *Crow Tribe of Indians v. Montana*, 650 F.2d 1104 (9th Cir. 1981); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971). In fact, tribal challenges to state taxation under 28 U.S.C. § 1362 are unique because most challenges to state tax provisions are barred from federal review under the Tax Injunction Act, a bar separate and distinct from that posed by the Eleventh Amendment. *See* 28 U.S.C. § 1341 (federal courts lack jurisdiction to consider challenges to state taxes if a "plain, speedy and efficient remedy may be had in the courts of such State").[8]

In the final analysis, we conclude that the Tribe's suit is properly characterized as a suit for declaratory relief against state officers and not against the state itself, and that *Coeur d'Alene*, while instructive, is inapposite.

II. Adequate Remedy At Law

As to the district court's alternative basis for dismissing the case – that the *Young* exception was inapplicable because there existed an adequate remedy at law in state

[8] *See also Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 572-73 & n.3 (10th Cir. 2000) (upholding jurisdiction under § 1362 and concluding that the Eleventh Amendment did not bar a tribe's suit to enjoin enforcement of a state motor fuel tax). Although we agree with the result in *Sac & Fox*, we believe that the question of whether the Eleventh Amendment bars a tribe's state tax challenge brought under § 1362 cannot be answered without considering *Coeur d'Alene* and the new twist it puts on Eleventh Amendment analysis, nor do we believe that *Moe* addressed the Eleventh Amendment issue.

court – we conclude the dismissal was error. That there existed an alternate forum in state court in which the Tribe could raise its claims neither divested the district court of jurisdiction nor removed the case from the *Young* exception for Eleventh Amendment purposes. The Supreme Court's decision in *Coeur d'Alene*, although divided, supports this conclusion. Justice Kennedy stated in the principal opinion that "[w]here there is no available state forum the *Young* rule has special significance," *id.* at 271, and concluded that one instance in which *Young* applies is if there is "no state forum available to vindicate federal interests," *id.* at 270. He ultimately acknowledged, however, that "[e]ven if there is a prompt and effective remedy in a state forum, a second instance in which *Young* may serve an important interest is when the case calls for the interpretation of federal law." *Id.* at 274. Moreover, three other Justices indicated that the availability of a state forum is not a bar to the *Young* doctrine, stating that "[n]ot only do our early *Young* cases fail to rely on the absence of a state forum as a basis for jurisdiction, but *we also permitted federal actions to proceed even though a state forum was open to hear the plaintiff's claims.*" *Id.* at 292 (O'Connor, J., concurring in part) (emphasis added), and characterized the principal opinion as "ultimately conced[ing]" that "in more recent cases *Young* has been applied '[e]ven if there is a prompt and effective remedy in a state forum.' " *Id.* at 293 (quoting the principal opinion at 274). In light of these views, and given our previous holding that "[t]he viability of *Ex parte Young* as *traditionally* applied survives the Supreme Court's treatment of the issue in *Idaho v. Coeur d'Alene Tribe*," *Doe v. Lawrence Livermore*, 131 F.3d at 839 (emphasis added), we

conclude that the existence of a remedy at law in state court is not a bar to the *Young* exception.[9] And while we agree that in evaluating a claim for injunctive or declaratory relief courts must necessarily consider the adequacy of any remedy at law before awarding equitable relief,[10] under these circumstances this determination should be made in connection with an analysis of the merits.[11]

CONCLUSION

In sum, we hold that the Tribe's claims fall within the *Young* exception; the Eleventh Amendment neither barred this action nor divested the district court of jurisdiction. We REVERSE the district court's dismissal for lack of jurisdiction and REMAND for consideration of the merits.

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[9] *Accord ANR*, 150 F.3d at 1192 ("[I]t appears to be clear . . . in *Coeur d'Alene Tribe* that an *Ex Parte Young* injunction still may issue even when the state courts would provide an adequate forum for the plaintiff's constitutional claims.").

[10] *See Coeur d'Alene*, 521 U.S. at 292 ("[T]he inadequacy of a legal remedy is a prerequisite for equitable relief in any case.") (O'Connor, J., concurring in part).

[11] Indeed, the adequacy of a remedy at law bears on whether a court *ought* to act, not whether a court has the *power* to act. "The exclusive equitable jurisdiction, or the *power* of courts to adjudicate upon the subject-matters coming within that jurisdiction, exists independently of the adequacy or inadequacy of the legal remedies obtainable under the circumstances of any particular case." 1 POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 218, at 368 (1994) (emphasis omitted and added).

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AGUA CALIENTE BAND OF CAHUILLA INDIANS, a federally-recognized Indian tribe; and AGUA CALIENTE TRIBAL CORPORATION, a federally-chartered tribal governmental corporation, Plaintiffs, v. JOHAN KLEHS, in his official capacity as a member of the California	CASE NO. CV-98-5221-R(RZx) JUDGMENT AFTER TRIAL BY COURT (Filed Dec. 14, 1998) Date: December 1, 1998 Time: 9:00 a.m. Place: Courtroom 8 Judge: Manuel L. Real

State Board of Equalization; DEAN ANDAL, in his official capacity as a member of the California State Board of Equalization; ERNEST J. DRONENBURG, JR., in his official capacity as a member of the California State Board of Equalization; JOHN CHIANG, in his official capacity as a member of the California State Board of Equalization; and GALEN HARDIN, in his official capacity as Tax Compliance Specialist of the California State Board of Equalization,
Defendants.

The above numbered action having come on regularly for trial on December 1, 1998, before the Honorable Manuel L. Real, United States District Judge; Art Bunce, Esq., having appeared for the above named plaintiffs; Daniel E. Lungren, Attorney General of the State of California, by Herbert A. Levin and Marla K. Markman, Deputy Attorneys General, having appeared for the above named defendants; and the Court having considered the evidence, stipulations, and arguments presented to it, having decided that the above numbered action is jurisdictionally barred from the above entitled Court by

the Eleventh Amendment to the United States Constitution, and having made findings of fact and conclusions of law;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs Agua Caliente Band of Cahuilla Indians, a federally-recognized Indian Tribe, and Agua Caliente Tribal Corporation, a federally-chartered tribal government corporation, take nothing by their first amended complaint on file in the above numbered action.

DATED: Dec. 14, 1998

/s/ Manuel L. Real
UNITED STATES DISTRICT JUDGE

Presented by

/s/ Herbert A. Levin
HERBERT A. LEVIN, Deputy Attorney General

Attorney for Defendants
Johan Klehs, Dean Andal,
Ernest J. Dronenburg, Jr.,
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AGUA CALIENTE BAND OF CAHUILLA INDIANS, a federally-recognized Indian tribe; and AGUA CALIENTE TRIBAL CORPORATION, a federally-chartered tribal governmental corporation, Plaintiffs, v. JOHAN KLEHS, in his official capacity as a member of the California	CASE NO. CV-98-5221-R(RZx) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Dec 14, 1998) Date: December 1, 1998 Time: 9:00 a.m. Place: Courtroom 8 Judge: Manuel L. Real

State Board of Equalization; DEAN ANDAL, in his official capacity as a member of the California State Board of Equalization; ERNEST J. DRONENBURG, JR., in his official capacity as a member of the California State Board of Equalization; JOHN CHIANG, in his official capacity as a member of the California State Board of Equalization; and GALEN HARDIN, in his official capacity as Tax Compliance Specialist of the California State Board of Equalization,

Defendants.

The above numbered action having come on regularly for trial on December 1, 1998, before the Honorable Manuel L. Real, United States District Judge; Art Bunce, Esq., having appeared for the above named plaintiffs; Daniel E. Lungren, Attorney General of the State of California, by Herbert A. Levin and Marla K. Markman, Deputy Attorneys General, having appeared for the above named defendants; and the Court having considered the evidence, stipulations, and arguments presented to it, now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff Agua Caliente Band of Cahuilla Indians (hereinafter referred to as "the Tribe") is a federally-recognized Indian tribe.

2. The Tribe exercises its sovereign authority, subject to paramount federal law, over the lands of the Agua Caliente Indian Reservation (hereinafter referred to as "the Reservation").

3. Reservation is located in a checkerboard pattern (interspersed with land not on the Reservation) in the Cities of Palm Springs, Cathedral City, and Rancho Mirage, and in unincorporated areas of Riverside County, California.

4. Plaintiff Agua Caliente Tribal Corporation (hereinafter referred to as "the Corporation") is a federally recognized tribal corporation.

5. The tribe owns 100% of the stock of the corporation.

6. Former Defendant California State Board of Equalization (hereinafter referred to as "the Board") is an agency of the State of California.

7. Defendants Johan Klehs, Dean Andal, Ernest J. Dronenburg, Jr., and John Chiang (hereinafter referred to along with Defendant Galen Hardin, *infra*, as "the State Officials") are members of the Board.

8. Defendant Galen Hardin is a Tax Compliance Specialist for the Board.

9. The Spa Hotel is located on the Reservation in the City of Palm Springs, California.

10. During the period November 1 1992, to June 30, 1997, the Corporation operated the Spa Hotel and sold food and beverages in the restaurants and bars thereof to non-members of the Tribe.

11. These non-members of the Tribe ate this food and drank these beverages on the Reservation.

12. The Corporation imported the above food and beverages onto the Reservation.

13. The cost to the Corporation of the above food and beverages was 34.58% of the amounts paid by the above non-members of the Tribe to the Corporation for said food and 23.08% of the amounts paid by said non-members to the Corporation for said beverages.

14. For the above period, the Board assessed the Corporation a use tax collection and remittance liability (Cal. Rev. & Tax. Code §§ 6201, 6202, 6203, 6204) at the rate of 7.75% of the prices paid by the above non-members of the Tribe to the Corporation for the above food and beverages.

15. The amount of this disputed use tax collection and remittance liability was $354,038.68, excluding interest and penalty.

16. The Corporation has not paid this disputed liability to the Board.

CONCLUSIONS OF LAW

1. The Tribe and the Corporation seek to proceed against the State Officials under the exception provided by *Ex parte Young*, 209 U.S. 123 (1908), to the jurisdictional

bar of the Eleventh Amendment to the United States Constitution.

2. The *Ex parte Young* exception provides an equitable remedy.

3. An equitable remedy is not available when there is an adequate remedy at law.

4. The Tribe and the Corporation have the adequate remedy at law of having the Corporation pay the disputed tax and sue for a refund thereof in state court.

5. The *Ex parte Young* exception is not available to the Tribe and the Corporation because they have the adequate remedy at law of having the Corporation pay the disputed tax and sue for a refund thereof in state court.

6. The *Ex parte Young* exception is not available in core areas of state sovereignty.

7. State Taxation is a core area of state sovereignty such that the *Ex parte Young* exception is not available therein.

8. The *Ex parte Young* exception is not available to the Tribe and the Corporation in the core sovereign area of state taxation involved in the present action.

9. As the *Ex parte Young* exception is not available in the present action for two independently sufficient reasons (the adequacy of the remedy at law and the core sovereign nature of state taxation), the present action is jurisdictionally barred from the above entitled Court by the Eleventh Amendment to the United States Constitution.

10. The State Officials are entitled to judgment that the Tribe and the Corporation take nothing by their first amended complaint on file in the above numbered action.

DATED: Dec. 14, 1998

/s/ Manuel L. Real
UNITED STATES DISTRICT JUDGE

Presented by

/s/ Herbert A. Levin
HERBERT A. LEVIN, Deputy Attorney General

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

AGUA CALIENTE BAND OF CAHUILLA INDIANS, a federally-recognized Indian tribe; and AGUA CALIENTE TRIBAL CORPORATION, a federally-chartered tribal governmental corporation,

Plaintiffs,

vs.

JOHAN KLEHS, in his official capacity as a member of the California State Board of Equalization; DEAN ANDAL, in his official capacity as a member of the California State Board

Case No. CV-98-5221-R (RZx)

PRE-TRIAL CONFERENCE ORDER

(Filed Oct. 19, 1998)

Pre-Trial Conference:
October 19, 1998
11:00 a.m.
Courtroom 8

of Equalization; ERNEST J. DRONENBURG, JR., in his official capacity as a member of the California State Board of Equalization; JOHN CHIANG, in his official capacity as a member of the California State Board of Equalization; and GALEN HARDIN, in his official capacity as Tax Compliance Specialist of the California State Board of Equalization,

Defendants.

Following pre-trial proceedings pursuant to Rule 16, F.R. Civ. P., and Local Rule 9, IT IS HEREBY ORDERED:

1. The parties are:

a. Agua Caliente Band of Cahuilla Indians, plaintiff

b. Agua Caliente Tribal Corporation, plaintiff

c. Johan Kelhs [sic], defendant

d. Dean Andal, defendant

e. Ernest J. Dronnenberg, Jr., defendant

f. John Chiang, defendant

g. Galen Hardin, defendant

Each of these defendants has been served and has appeared. All other parties named in the pleadings and not identified in the preceeding paragraph are now dismissed.

2. The pleadings which raise the issues are:

a. First Amended Complaint for Declaratory and Injunctive Relief

b. Answer to First Amended Complaint for Declaratory and Injunctive relief.

3. The trial is estimated to take one trial day, if there is a trial.

4. The trial is to be a non-jury trial, if there is a trial.

5. The following facts are admitted and require no proof:

a. Plaintiff the Agua Caliente Band of Cahuilla Indians (hereinafter referred to as the "Tribe") is a federally-recognized Indian tribe with a governing body, its Tribal Council, which is duly recognized by the Secretary of the Interior.

b. The tribe exercises its sovereign authority, subject to paramount federal law, over the lands of the Agua Caliente Indian Reservation (hereinafter referred to as the "Reservation").

c. The Reservation is located in a checkerboard pattern (interspersed with land not on the Reservation) in portions of the Cities of Palm Springs, Cathedral City, and Rancho Mirage, as well as in the unincorporated areas of Riverside County, California.

d. Real property located in the Reservation, title to which is held in trust by the United States for either the Tribe or its members, is not subject to California ad valorem property tax. Such property not held in trust for either the Tribe or its members is subject to California ad valorem property tax.

e. Non-members of the Tribe are subject to property tax on their possessory interests as lessees of lands of the Reservation, title to which is held in trust for either the Tribe or its members by the United States.

f. The members of the Tribe are citizens and residents of the State of California with the same rights as all other citizens and residents of the State of California, such as the right to vote and the right to attend public educational institutions.

g. Plaintiff Agua Caliente Tribal Corporation (hereinafter referred to as the "Corporation") is a federally-recognized tribal corporation existing under a charter issued by the Assistant Secretary of the Interior pursuant to 25 U.S.C. §477.

h. Former defendant California State Board of Equalization (hereinafter referred to as the "Board") is an agency of the State of California.

i. The Board is authorized by the law of the State of California to enforce the Sales & Use Tax Law of the State of California (Cal. Rev & Tax. Code §§6001-7176), the Uniform Local Sales and Use Tax Law of the State of California (Cal. Rev. & Tax. Code §7200-7226), and the Transactions and Use Tax Law of the State of California (Cal. Rev. & Tax. Code §7251-7279.6).

j. Defendants Johan Klehs, Dean Andal, Ernest J. Dronnenberg, Jr., and John Chiang are individuals and are named as defendants in their official capacities as members of the Board.

k. Defendant Galen Hardin is an individual, a resident of the County of Riverside, California, and is named as a defendant solely in his official capacity as a Tax Compliance Specialist of and for the Board.

l. The Spa Hotel is located on the Reservation in the City of Palm Springs, California, and includes 230 rooms for guests, a gambling casino, and the hot water natural mineral springs after which the City of Palm Springs takes its name. The United States now holds title to the approximately eight-acre parcel of land on which the Spa Hotel is located in trust for the Tribe, and has so held title to that parcel since the Reservation was established in 1876.

m. For the period from November 1, 1992 to June 30, 1997, the Corporation operated the Spa Hotel and sold food and beverages in the restaurants and bars thereof to non-members of the Tribe. The Corporation did so as lessee under a lease, PSL-1, in which the Tribe was the lessor, which lease was approved by the Secretary of the Interior as required by 25 U.S.C. §415. Under this lease, the Corporation pays to the Tribe a base rent plus a percentage of the gross receipts of the Spa Hotel.

n. To purchase this leasehold interest from the previous lessee, the Tribe borrowed $8,750,000 from a private source. The United States has guaranteed the repayment of 90% of this indebtedness. The Tribe pays approximately $57,000 per month to service this 20-year

debt. The Corporation has delegated responsibility for the day-to day operations of the Spa Hotel to a subsidiary Tribal organization known as the Agua Caliente Development Authority (hereinafter referred to a the "ACDA"). The ACDA conducts its business through its Board of Directors, all members of which are appointed by the Tribe's Tribal Council. The Chairman of the Board of Directors has always been a member of the Tribe, first Mr. Lawrence Olinger, a former Tribal Chairman, then Ms. Priscilla Pete, and currently Mr. Dana Prieto. In addition, the following Tribal Members are currently members of the Board of Directors of the ACDA: Jeanette Prieto-Dodd, Priscilla Pete, and Leroy Segundo. The Tribal Ordinance establishing the ACDA specifies that the Tribal Members on the Board of Directors have an effective veto power over the development decisions of the Board. Neither the Tribe, nor the Corporation, nor the ACDA employs any non-Indian management company.

o. For the above period, the Board assessed the Corporation a use tax collection and remittance liability (Cal. Rev. & Tax. Code §§6201, 6202, 6203, 6204) at the rate of 7.75% of the price paid by the above non-members of the Tribe to the Corporation for the above food and beverages. This assessment does not pertain to the Tribe's sales of items other than food and beverages. Such other items are imported onto the Reservation and sold with little or no change to non-members. These non-members leave the Reservation without having consumed those other items on the Reservation. As to such other items, the Tribe does charge, collect, remit, and report to the Board regarding California use tax. There is no dispute regarding taxation of such items other than food and beverages.

p. The amount of the above disputed use tax collection and remittance liability for the above period, excluding interest and penalty, was $354,039.68.

q. The above non-members of the Tribe ate the above food and drank the above beverages on the Reservation.

r. The Corporation imported the above food and beverages onto the Reservation.

s. The Corporation has not paid the above disputed use tax collection and remittance liability to the Board.

t. The above rate of 7.75% had the following components in terms of recipients of the proceeds of the amount of use tax if the Corporation had paid such amount to the Board:

a.	State of California:	6.00%; and
b.	City of Palm Springs:	1.00%; and
c.	County of Riverside:	0.25%; and
d.	Riverside County Transportation Commission:	0.50%.

u. The above 6.00% would have gone into the State General Fund for the Support of general operations of the State Government, including public education from kindergarten through graduate school. None of these funds, had they been paid, would have been devoted to particular identifiable services or other benefits provided by the State to the Tribe, its members, or the Spa Hotel, beyond services and benefits that the State provides on a non-discriminatory basis to all of its citizens.

v. The above 1.00% would have gone for the support of the general operations of the City of Palm Springs, including the police and fire departments thereof. Through a serious of voluntary contributions, the Tribe seeks to offset any costs that the City of Palm Springs might incur in providing ordinary municipal services to the Spa Hotel. During fiscal year 1996, the Tribe made the following voluntary contributions for these purposes:

City of Palm Springs	$72,500
Palm Springs Unified School District	50,000
Palm Springs Fire Department	35,000
Palm Springs Police Department	85,000
City of Cathedral City	10,000

During fiscal year 1997, the Tribe made the following voluntary contributions for the same purposes:

City of Palm Springs	$73,500
Palm Springs Unified School District	15,000
Palm Springs Fire Department	20,000
Palm Springs Police Department	20,000
City of Cathedral City	13,500
Cathedral City Fire Department	20,000
Cathedral City Police Department	20,000

During fiscal year 1998, the Tribe has made the following voluntary donations for the same purposes, and more may yet be made before the end of the year:

City of Palm Springs	$55,000
Palm Springs Unified School District	30,000

Palm Springs Fire Department	40,000
Palm Springs Police Department	80,000
City of Cathedral City	45,000
Cathedral City Fire Department	40,000
Cathedral City Police Department	60,000

Similarly, the Tribe further offsets such costs by making voluntary payments of various taxes which are not otherwise due. The Tribe voluntarily pays 53% of the Transient Occupancy Tax of the City of Palm Springs on its rentals of rooms at the Spa Hotel to guests. For example, for the year ending on June 30, 1998, the Tribe paid $283,379.31 to the City of Palm Springs for this purpose. The Tribe voluntarily pays approximately $33,000 per year to the City of Palm Springs as payment of the City's tax on utilities supplied to the Spa Hotel. The Tribe also voluntarily pays the City of Palm Springs' taxes on cable television and waste disposal service supplied to the Spa Hotel, as well as approximately $30,000 in various permit and development fees of the City of Palm Springs regarding development of an adjacent parking lot for the Spa Hotel. Under the current agreement between the City of Palm Springs and the Tribe, the Tribe alone provides for land use, zoning, and related services for the Spa Hotel and the parcels of land on which it is located, rather than the City of Palm Springs.

w. The above 0.25% would have gone solely for maintenance of roads and operation of public transit systems in the County of Riverside. The Tribe voluntarily pays Transportation Uniform Mitigation Fees to Riverside County to offset any incremental impact that the Tribe's

operations might have on the County's transportation system.

x. The above 0.50% would have gone solely for public transportation in the county of Riverside. The County of Riverside and other local governmental entities receive approximately $78,000,000 per year in the possessory interest taxes described in item no. 5.e. above.

y. During the above period, the Corporation had a liquor license issued to it by former defendant California Department of Alcoholic Beverage Control for sales of alcoholic beverages on the property of the Spa Hotel.

z. During the above period, the cost to the Corporation of the food and beverages sold by it in the restaurants and bars of the Spa Hotel to non-members of the Tribe was 34.58% of the amounts paid by said non-members to the Corporation for said food and 23.08% of the amounts paid by said non-members to the Corporation for said beverages.

aa. During the above period, a majority of employees at the Spa Hotel were not members of the Tribe, but the following members of the Tribe were employees at the Spa Hotel in the following capacities:

a. John Patencio: Operations Manager

b. Michael Pete: Management Training

c. Annette Guzman: Front Desk Operations

d. Della Patencio: Spa Technician

e. Vincent Gonzales III: Casino Management Department, Management Intern

f. Maureen Hernandez: Director of Casino Environmental Services

g. Lorena Riggs: Casino Attendant

h. Sean Milanovich: Casino Mechanic

i. Ray Patencio, Jr.,: Casino Mechanic

j. Susan Velasco: Assistant Director, Casino Mechanical Department

bb. If the Corporation does not pay to the Board the above disputed use tax collection and remittance liability in the amount of $354,039.68, plus the interest and penalty thereon, and if the above-entitled Court does not enter a declaratory judgment that said disputed use tax collection and remittance liability is not legally due to the State of California from the Corporation, former Defendant California Department of Alcoholic Beverage Control is authorized to and is expected to suspend the above liquor license.

cc. The Corporation can avoid the above suspension of its liquor license and can obtain judicial review, although not in the courts of the United States, of the legality of the above disputed use tax collection and remittance liability by paying the amount thereof, plus the penalty and interest thereon, to the Board and suing the Board for a refund of said amount, plus said interest and penalty, in the Superior Court of the State of California.

dd. The Tribe owns 100% of the stock of the Corporation, and there is no legally relevant distinction between the Tribe and the Corporation for the purpose of deciding the legality of the above disputed use tax collection and remittance liability.

ee. The suspension of the above liquor license for any appreciable length of time would ruin the business of the Spa Hotel and cause default in repayment of the loan described in item no. 5.n. above.

6. The following facts, though stipulated, shall be without prejudice to any evidentiary objection:

(none)

7. The claims of the plaintiffs are as follows:

a. All sales which are the subject of this action occur within the boundaries of the Agua Caliente Indian Reservation.

b. The food and beverages sold by the Tribe and/or the Corporation to non-members at the Spa Hotel are items of reservation-based value. The Tribe and the Corporation contend that the elements of reservation-based value that they add at their expense to the raw food and beverages which are imported onto the Reservation include labor in preparation, presentation, and service, capital costs of the Spa Hotel, furniture, fixtures, equipment, utilities, insurance, management, administration, taxes, supplies, linen service, equipment rental, promotions, uniforms, and other costs commonly incurred by those who operate restaurants and bars at which food and beverages are served for on-site consumption.

c. The individual defendants, named as individuals in their official capacities, are acting outside their authority and in derogation of federal law in attempting to impose California use tax collection and remittance liability on the Tribe's and/or the Corporation's sales of food and beverages to non-members for on-site consumption at the Spa Hotel. Therefore, the Eleventh Amendment to the U.S. Constitution does not bar this action as against them on the theory of *Ex Parte Young*.

d. Federal policy and goals of promoting tribal self-sufficiency and economic development, as well as the factual factors noted above, outweigh state interests in taxation of the subject sales by the Tribe of food and beverages to non-members at the Spa Hotel within the Agua Caliente Indian Reservation in this case. Therefore taxation by the State of California, acting through the Board and the above individual defendants, of such sales, both for the above period as well as now and in the future, is preempted by federal law and is thus impermissible as a matter of federal law under the Supremacy Clause of the U.S. Constitution.

e. A real, live, and actual controversy, suitable for resolution by declaratory judgment, exists as between the Tribe and the Corporation on the one hand, and the defendants on the other hand, in that the Tribe and the Corporation believe that the subject sales of food and beverages by the Tribe and the Corporation to non-members at the Spa Hotel for on-site consumption are sales of items of reservation-based value and that state taxation of such sales is preempted by federal law, while the defendants believe to the contrary.

f. There are no genuine issues of material fact presented in this case, and the Tribe and the Corporation are entitled to judgment as prayed for in the first amended complaint.

Items a, b and d above are also ultimate facts which, if proven or stipulated, support and compel the above conclusions of law. The evidence relied upon to prove these ultimate facts is as set forth above in the statement of stipulated facts, and in the testimony, if necessary, of Fred Razzar, Timothy Taylor, and Michael D. Harris.

The affirmative defenses of the defendants are as follows:

a. The above-entitled Court lacks jurisdiction over the subject matter of the above-numbered action because said action does not fall within the *Ex Parte Young* exception to the Eleventh Amendment to the U.S. Constitution in that: (1) the Tribe and the Corporation have an adequate remedy at law, and (2) any judgment to be obtained in said action would impinge on core sovereign interests of the State of California against which interests the *Ex Parte Young* theory is not available.

b. The Corporation was required to collect use tax from the purchasers of food and beverages from the Corporation and is indebted to the State of California for the amount of this tax.

c. The Corporation's sales of food and beverages to non-members at the Spa Hotel are not sales of items of reservation-based value.

d. Even if the Corporation's sales of food and beverages to non-members at the Spa Hotel are sales of

items of reservation-based value, federal law does not preempt the Board's jurisdiction to assess its use tax collection and remittance liability concerning such sales.

e. The Corporation does not have the legal right to determine the applicability and amount of the use tax which state law imposes on non-Indians for the consumption of items sold to them and which federal law requires the Corporation to collect on behalf of the Board.

f. The Tribe and the Corporation cannot contend that there was no retail sale to non-Indians such that there would be no use tax imposed on the non-Indians and no obligation on the Corporation to collect such use tax based on either the retail price of the food and beverages charged to the non-Indians or on the wholesale price of the food and beverages purchased ex-tax by the Corporation.

The ultimate facts to be prove by the defendants are items b, c, d, e, and f above. Defendants will rely on the same evidence as will plaintiffs on these points.

8. All discovery is complete.

9. If a trial is necessary, a joint exhibit list has been previously filed under separate cover as required by Local Rule 9.7. All exhibits may be admitted without objection.

10. If a trial is necessary, plaintiffs' witnesses will be:

a. Fred Razzar

b. Timothy Taylor

c. Michael D. Harris

11. No deposition testimony will be used.

12. The following law and motion matters are contemplated: defendants's motion for judgment on the pleadings, and a renewed motion for summary judgment presented by plaintiffs.

13. Bifurcation is not necessary.

14. The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this pretrial conference order shall supersede the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: October 19, 1998 /s/ Manuel L. Real
U.S. District Judge

Approved as to form and content and jointly submitted by:

/s/ Art Bunce
Art Bunce, Attorney for Plaintiffs

/s/ Herbert A. Levin
Herbert A. Levin, Attorney for Defendants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AGUA CALIENTE BAND OF CAHUILLA INDIANS, a federally-recognized Indian Tribe; AGUA CALIENTE TRIBAL CORPORATION, a federally-chartered Tribal governmental corporation,

Plaintiffs-Appellants,

v.

GALEN HARDIN, in his official capacity as Tax Compliance Specialist of California State Board of Equalization; JOHAN KLEHS, in his official capacity as a member of the California State Board of Equalization; DEAN ANDAL, in his official capacity as member of the California State Board of Equalization; ERNEST J. DRONENBURG, JR., in his official capacity as member of the California State Board of Equalization; JOHN CHIANG, in his official capacity as member of the California State Board of Equalization,

Defendants-Appellees.

No. 99-55251

D.C. No. 98-CV-05521-R

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

(Filed Oct. 26, 2000)

Before: TROTT, FERNANDEZ, and McKEOWN, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and the suggestion for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Const., Amend. XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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28 U.S.C. § 1341:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

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28 U.S.C. § 1362:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Cal. Rev. & Tax. Code § 6933:

Within 90 days after the mailing of the notice of the board's action upon a claim filed pursuant to Article 1 (commencing with Section 6901), the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in any city or city and county of this state in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

Failure to bring action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

Cal Rev. & Tax. Code § 6934:

If the board fails to mail notice of action on a claim within six months after the claim is filed, the claimant may, prior to the mailing of notice by the board of its action on the claim, consider the claim disallowed and bring an action against the board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an over payment.

Cal. Rev. & Tax. Code § 6935:

If judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any sales or use

tax or amount of use tax due and payable from the plaintiff. The balance of the judgment shall be refunded to the plaintiff.

Cal Rev. & Tax. Code § 6936:

In any judgment, interest shall be allowed at the modified adjusted rate per annum established for overpayments pursuant to Section 6591.5 upon the amount found to have been illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment or to a date preceding the date of the refund warrant by not more than 30 days, the date to be determined by the board.